

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

LUKE RICHEY and JENNIFER  
RICHEY, husband and wife,

Plaintiffs,

vs.

METAXPERT, LLC a Washington  
limited liability company; et  
al.,

Defendants.

METAXPERT, LLC and PLAYXPERT,  
LLC,  
Counterclaimants,

vs.

LUKE RICHEY and JENNIFER  
RICHEY, husband and wife; et  
al.,

Counterdefendants

NO. CV-10-00020-LRS

**ORDER GRANTING IN PART AND  
DENYING IN PART PLAINTIFFS'  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT**

**BEFORE THE COURT** is Plaintiffs' Motion for Partial Summary  
Judgment (ECF No. 172). The motion is heard without oral argument.

**I. BACKGROUND**

Plaintiff Luke Richey was employed by MetaXpert from November 20,  
2007, until his termination sometime in October 2009. Plaintiffs'  
allegations pertinent to this Motion for Partial Summary Judgment are:  
(1) Defendants owe Plaintiffs \$56,534.70 in unpaid wages, (2)

1 Defendants owe Plaintiffs an undetermined amount for health insurance  
2 benefits not paid in violation of the employment agreement,  
3 (3) Defendants owe Plaintiffs \$48,000 in severance payment as per the  
4 employment agreement between Richey and MetaXpert, (4) Plaintiffs are  
5 entitled to collect attorney's fees under RCW 49.48.030, (5)  
6 Plaintiffs are entitled to double damages, attorney's fees, and costs  
7 under RCW 49.52.070, and (6) any damages granted to Plaintiff under  
8 Washington wage laws may not be set-off by Defendants' counterclaims.  
9

## 10 **II. SUMMARY JUDGMENT**

11 A party is entitled to summary judgment when, considering all  
12 inferences drawn from the underlying facts in the light most favorable  
13 to the non-moving party, there is no genuine issue of material fact  
14 that might affect the outcome of the claim at trial. *United States v.*  
15 *Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993 (1962); *Anderson v.*  
16 *Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986). The  
17 evidence must be such that no reasonable trier of fact could return a  
18 verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248.  
19 The moving party has the burden of proving no genuine issue of  
20 material fact exists. *Matsushita Elec. Industrial Co. v. Zenith Radio*  
21 *Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348 (1986). Once the moving party  
22 has carried this burden, however, the opposing party "must do more  
23 than simply show some metaphysical doubt as to the material facts."  
24 *Id.* The opposing party must designate specific facts beyond the  
25 pleadings that establish a genuine issue of fact for trial. *Celotex*  
26 *Corp. v. Catrett*, 477 U.S. 317, 324-25, 106 S.Ct. 2548 (1986).

1 **III. DISCUSSION**

2 *A. Overview*

3 There is no evidence to suggest any genuine issues of material  
4 fact regarding the claims of unpaid wages; Mr. Richey is owed  
5 \$56,534.70 in unpaid wages. Whether Mr. Richey is owed the value of  
6 health benefits under the terms of his employment contract will depend  
7 on whether any other employees received benefits during the period he  
8 did not. This is not undisputably established by the record in its  
9 current state and remains an issue of fact to be determined at trial.  
10 The employment contract between Mr. Richey and MetaXpert makes clear  
11 that if he were terminated within two years of the commencement of his  
12 employment he would be entitled to three months pay and benefits.  
13 There remains, however, a factual dispute regarding whether Mr. Richey  
14 was terminated within two years of the beginning of his employment,  
15 and this claim cannot be decided on summary judgment. Under RCW  
16 49.48.030 a court must grant a plaintiff who is successful in  
17 recovering unpaid wages under RCW 49.48.010 attorney's fees against  
18 the Defendants. Accordingly, Plaintiffs must be granted attorney's  
19 fees based on the facts before the court. Under RCW 49.52.070  
20 exemplary damages may be available to a Plaintiff where the  
21 Plaintiff's employer "willfully" withheld wages the employer was  
22 obligated to pay. Here there remains a genuine issue of material fact  
23 regarding whether MetaXpert or Mr. Manning willfully withheld wages  
24 they were obligated to pay Mr. Richey.

25 Defendants' counterclaims are allowable and, if proven, may be  
26 set-off from any amount granted Plaintiffs on summary judgment for

1 claims made under RCW 49.48.010. There is presently no Washington case  
2 law addressing the particular issue whether claims made under this  
3 statute can be set-off by an employer's counterclaims. Washington's  
4 Minimum Wage Act (MWA) is based on the federal Fair Labor Standards  
5 Act (FLSA) and where state law is lacking, the court may consider  
6 interpretations of the FLSA as guidance. Federal courts have been  
7 reluctant to allow employer counterclaims in FLSA minimum wage and  
8 overtime cases, especially if the result of the set-off could  
9 effectively reduce the employee's wages below levels required under  
10 the act. RCW 49.48.010, however, is not based on the FLSA and does not  
11 expressly or implicitly preclude employer counterclaims. No authority  
12 suggests that an employer cannot make legitimate counterclaims against  
13 an employee who is owed unpaid wages and have the value of those  
14 claims, if proven, set-off from the amount owed the employee.  
15 Protecting employee claimants against certain counterclaims in minimum  
16 wage and overtime contexts is intended to protect an employee's right  
17 to statutorily guaranteed minimum compensation; there is no policy  
18 basis for precluding counterclaims in other employment cases where  
19 there is no risk of a plaintiff's wage compensation falling below  
20 minimum required levels.

21 *B. Unpaid Wages*

22 There is no evidence in the record to suggest a genuine issue of  
23 material fact regarding wages owed Luke Richey under RCW 49.48.010.  
24 Mr. Richey is owed \$56,534.70 in unpaid wages.

25 RCW 49.48.010 provides, in pertinent part:  
26

1 When any employee shall cease to work for employer, whether by  
2 discharge or by voluntary withdrawal, the wages due him or her on  
3 account of his or her employment shall be paid to him or her at  
4 the end of the established pay period. . . . **PROVIDED FURTHER,**  
5 That the duty to pay an employee forthwith shall not apply if the  
6 labor-management agreement under which the employee has been  
7 employed provides otherwise.

8 RCW 49.48.010 (2011). It is also unlawful for an employer to withhold  
9 wages from an employee except as required by law, where specifically  
10 agreed upon by the employee and employer, or for certain medical  
11 purposes. *Id.* An agreement to temporarily withhold wages does not  
12 relieve an employer from the ultimate responsibility of paying the  
13 employee the full amount owed under contract. *Durand v. HIMC Corp.*, 151  
14 Wn. App. 818, 837, 214 P.3d 189 (Div. 2, 2009) (holding, in part, that  
15 employee who voluntarily deferred wages "until the companies were in  
16 better financial circumstances" was owed all unpaid wages after his  
17 termination).

18 Defendants admit to owing as much as \$56,534.70. ECF No. 190, at  
19 15). This number is well documented elsewhere in the record. For  
20 example, the evidence indicates that Mr. Manning admits that the amount  
21 of compensation that he agreed to defer until cash flow problems  
22 improved "is no greater than \$56,534.70." ECF No. 190, at 16. Mr.  
23 Manning acknowledged it was his intention to pay Mr. Richey the "back  
24 wages" MetaXpert admittedly owed:

25 **Mr. Richey wrote on 10/28/09:**

26 Charles when will I be getting my current and back wages owed? I  
need to get my paychecks or at least some of them soon. I  
honestly don't want to go to Labor and Industries and put  
you in a bad spot. I forgive [sic] you for what you have  
done and are doing but it doesn't change the need to get my  
wages paid. Can you give me some insight into what your plan  
is here?

**Mr. Manning wrote in response on 10/28/09:**

Luke-

Its my intention to pay you what the company owes you in as timely a manner as we are able. As you know, cash flow has been extremely limited this month. My goal is to have you included in this next payroll cycle.

ECF No. 279, Exh. b. Additionally there is deposition testimony from Evette Neddo that Mr. Richey was owed \$56,534.70, which appeared on the Quick Books used for MetaXpert's accounting purposes. ECF No. 173-2.

Defendants claim, however, that this money was in fact a loan, which Mr. Richey agreed to have repaid only when MetaXpert's cash flow improved. The wages withheld from Mr. Richey were tracked in a QuickBooks file titled "loan," but there is no further evidence to suggest that either party actually considered it to be a loan or that it was in any legal sense a loan. Charles Manning himself refers to the \$56.534.70 as "deferred compensation." ECF No. 191, at 4. Simply tracking deferred compensation in a file titled "loan" does not make it so. The withheld money was wages for the purposes of RCW 49.48.010 and was due Mr. Richey at the end of the pay period immediately following his termination.

There is a dispute regarding whether Mr. Richey voluntarily agreed to have wages withheld, but this dispute is immaterial. ECF No. 190, 4. There is no evidence on the record that any agreement to defer compensation while MetaXpert was experiencing cash flow problems included a provision that Mr. Richey would not be payed the wages owed him even if he were terminated. Indeed, by the language of RCW 49.48.010, even such an agreement would not be binding unless it were express in the employment contract between Mr. Richey and MetaXpert.

1 That Mr. Richey may have voluntarily had his wages deferred does not  
2 excuse Defendants' obligation to pay him any unpaid wages at  
3 termination.

4 *C. Health Insurance Benefits*

5 The court cannot establish as a matter of law that Mr. Richey is  
6 owed the value of unpaid health insurance benefits. Clause 5 of the  
7 employment agreement between Luke Richey and MetaXpert provides that  
8 Mr. Richey was "entitled to participate in any and all employee welfare  
9 and health benefit plans." ECF No. 1, at 18. The agreement further  
10 provides:

11 Nothing herein shall be construed as requiring Company to  
12 establish or continue any particular benefit plan in discharge of  
13 its obligations under this Agreement, provided, however, that if  
14 the specified benefits are not offered to all employees, and no  
15 plan is adopted, Company shall increase compensation paid to  
16 Employee under Paragraph 4A to pay the cost of said benefits, net  
17 of taxes.

18 *Id.* It is undisputed that MetaXpert did not provide insurance to Mr.  
19 Richey during at least June 2009. ECF No. 190, at 6. Though clause 5 of  
20 the agreement is facially ambiguous, the court finds that evidence must  
21 establish whether any other MetaXpert employees were provided health  
22 insurance benefits during the period that Mr. Richey was not provided  
23 health insurance benefits; that fact is not clearly shown by the  
24 record. Further the record does not clearly show the extent of the time  
25 period Mr. Richey did not receive benefits. Issues of material fact  
26 remain regarding the extent of time Mr. Richey was not provided or  
compensated for health insurance benefits and whether other employees  
were payed benefits during that relevant time period. Based on the

1 current state of the record, this issue cannot be resolved on summary  
2 judgment.

3 *D. Severance*

4 There remains a genuine issue of material fact with regard to  
5 whether severance pay is owed. The employment contract between Luke  
6 Richey and MetaXpert provided that Mr. Richey would be entitled to  
7 three months salary and benefits if he were terminated during his first  
8 two years of employment. ECF No. 1, at 18-19. Defendants allege that  
9 Mr. Richey was given thirty days notice of termination on October 26th,  
10 and that his actual date of termination was November 25th, more than  
11 two years after he began. This court has preliminarily found that the  
12 employment contract does not require 30 days notice, and that the  
13 record suggests termination occurred during October, 2009. ECF No. 66,  
14 at 72; ECF No. 53, at 3. Nevertheless, when the termination actually  
15 occurred remains a genuine issue of material fact on which reasonable  
16 minds could differ, and the court cannot rule as a matter of law that  
17 the severance pay is due.

18 *E. Attorney's Fees*

19 Where an employee is successful in a claim for unpaid wages, the  
20 court must order recovery of reasonable attorney's fees against the  
21 employer unless the employer admits to owing an equal or greater amount  
22 in wages. RCW 49.48.030. Washington courts have interpreted RCW  
23 49.48.030 broadly, allowing recovery of attorney fees for any  
24 compensation due from employment. *Bates v. City of Richland*, 112  
25 Wash.App. 919, 939, 51 P.3d 816 (2002); *see also Int'l Ass'n of Fire*  
26 *Fighters, Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*,



146 Wash.2d 29, 35, 42 P.3d 1265 (2002) ("wages or salary owed" under RCW 49.48.030 includes back pay, front pay, sick leave, and commission). Attorney fees are recoverable even where there is a bona fide dispute between an employee and employer. *Peninsula School Dist. No. 401 v. Pubic School Employees of Penisula*, 130 Wash.2d 401, 924 P.2d 13 (1996).

Attorney's fees are required in this case. Defendants admit to owing Plaintiffs as much as \$56,534.70, but do not necessarily admit that full amount and do not admit the owed money is unpaid wages, characterizing it instead as a loan. ECF No. 190, at 15. Defendants' further dispute that any money was due to Mr. Richey in the pay period immediately following his termination. There may be legitimate disputes regarding whether other money is owed to Mr. Richey, but there is no issue of material fact regarding the \$56,534.70 in unpaid wages and defendants do not admit to owing unpaid wages. Attorney's fees must, therefore, be granted.

#### *F. Exemplary Damages*

An employer or agent of an employer who violates provisions (1) or (2) of RCW 49.52.050 is liable to the employee for twice the amount of unpaid wages, along with costs of the suit and reasonable attorney's fees, unless the employee knowingly and voluntarily submitted to the violations. RCW 49.52.070 (2011). Under RCW 49.52.050 (2), an employer who "[w]illfully and with intent to deprive the employee of any part of his or her wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract" is guilty of a misdemeanor.

1 The key issue in determining whether double damages are required  
2 under RCW 49.52.070 is whether an employer acted "willfully" in failing  
3 to pay wages. *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159,  
4 961 P.2d 371 (1998). Non-payment of wages is willful if it is the  
5 result of knowing and intentional action. *Ebling v. Gove's Cove, Inc.*  
6 34 Wn. App. 495, 500, 663 P.2d 132 (1983). Withholding wages is not  
7 "willful" if a bona fide dispute exists between the employer and  
8 employee regarding obligation of payment. *Lillig v. Becton-Dickinson*,  
9 105 Wash.2d 653, 659, 717 P.2d 1371 (1986). A dispute is "bona fide" if  
10 it is "fairly debatable" whether all or a portion of wages must be  
11 paid. *Schilling*, 136 Wn.2d at 161. Willfulness, including whether a  
12 bona fide dispute exists, is ordinarily a question of fact, but may be  
13 resolved on summary judgment if there is no genuine issue of material  
14 fact on which reasonable minds could differ. *Id.* at 160.

15 In the instant case, evidence has been presented which may suggest  
16 that Mr. Manning or MetaXpert acted willfully in failing to pay Mr.  
17 Richey. There is evidence that during the same period of time that  
18 MetaXpert did not pay Mr. Richey the wages he was owed, Mr. Manning  
19 paid himself salary and/or draws. There is also evidence Mr. Manning  
20 paid himself commissions on projects that he had not generated.  
21 Further, there is evidence that Mr. Manning paid many of his personal  
22 bills through the business, such as expenses for travel and dining out.  
23 It is also alleged that because Mr. Manning took most of the profit for  
24 himself, MetaXpert could not pay its employees and was slow in paying  
25 creditors. Finally, it is also alleged that Mr. Manning reduced  
26

employees' salaries across the board, but did not take a cut in his own salary. ECF No. 173, at 4.

Despite this evidence, there remain genuine issues of material fact regarding whether Mr. Manning or MetaXpert acted willfully and this issue cannot be resolved on summary judgment. MetaXpert was obligated to pay Mr. Richey all wages owed to him under contract and was obligated to pay all unpaid wages immediately following his termination. It is fairly disputed, however, whether the initial decision to withhold pay was made by Mr. Manning or Mr. Richey and whether Mr. Richey voluntarily agreed to have wages withheld. Further, reasonable minds could differ on whether there was a bona fide dispute between Mr. Richey and Defendants regarding the amount due him at the time of his termination.

H. *Can Defendant's Counterclaims set-off any recovery by Plaintiff?*

Washington courts have considered interpretation of the FLSA by federal courts in evaluating minimum wage and overtime claims under Washington's Minimum Wage Act (MWA). *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 298, 996 P.2d 582 (2000). The MWA is similar, but not identical, to the FLSA. "Because the MWA is based upon the FLSA, federal authority under the FLSA often provides helpful guidance. However, the MWA and FLSA are not identical and [Washington courts] are not bound by such authority." *Id.* (citing *Chelan County Deputy Sheriffs' ass'n v. County of Chelan*, 109 Wn.2d 282, 291, 745 P.2d 1 (1987)).

Unlike the MWA there is no federal corollary to RCW 49.48.010, yet Plaintiffs suggest that the court should consider interpretation of

1 the FLSA's minimum wage and overtime provisions as guidance relevant in  
2 this case. Federal courts have held that set-offs against wages due  
3 under the minimum wage and overtime provisions of the Fair Labor  
4 Standards Act for the value of goods furnished by an employer to an  
5 employee, "including gas and supplies from the company store" are not  
6 permissible if they cause the worker's compensation to fall below the  
7 minimum required by the act. *Brennan v. Heard*, 491 F.2d 1, 4 (5<sup>th</sup> Cir.  
8 1974), *rev'd on other grounds by McLaughlin v. Richland Shoe Co.*, 486  
9 U.S. 128 (1988). Federal courts have also held that overtime wages owed  
10 under the FLSA cannot be offset by a severance agreement, but may be  
11 offset by pre-payment of wages. *Martin v. PesiAmericas, Inc.*, 628 F.3d  
12 738 (5<sup>th</sup> Cir.2010) (Plaintiff allegedly breached severance agreement by  
13 bringing suit for unpaid overtime, value of severance agreement could  
14 not be used to set-off unpaid overtime wages).

15 Decisions which interpret the FLSA's minimum wage and overtime  
16 provisions are not informative or relevant in the instant case. RCW  
17 49.48.010 protects an employee's rights to receive any pay owed  
18 following termination and not to have pay improperly withheld, whereas  
19 the MWA and FLSA protect an employee's right to statutorily defined  
20 minimum wages. These protections are fundamentally different. Minimum  
21 wage laws and overtime laws are designed to protect the fundamental  
22 right to earn a living and to be compensated at a minimum level. RCW  
23 49.38.010, by contrast, merely protects an employee's right to timely  
24 payment of compensation that is already contractually owed. The policy  
25 basis for protecting a plaintiff who may have been denied minimum wage  
26 by an employer from claims by the employer, that in-fact the plaintiff

owes the employer money, does not readily translate to support protection of an employee who is compensated well above the minimum wage level from counterclaims in what is essentially a contractual dispute with a former employer.

Washington's scheme of comprehensive wage and hour laws suggest that the legislature strongly favors payment of wages due to employees. *Shilling v. Radio Holdings, Inc.*, 136 Wash.2d 152, 157, 961 P.2d 371 (1998). This policy, however, does not suggest that an employer should be denied a remedy for legitimate contract or tort claims against an employee, at least outside of narrow exceptions in minimum wage and overtime violation cases.

As RCW 49.48.010 makes clear, an employer cannot withhold an employee's wages except in three distinct circumstances:

It shall be unlawful for any employer to withhold or divert any portion of an employee's wages unless the deduction is:

- (1) Required by state or federal law; or
- (2) Specifically agreed upon orally or in writing by the employee and employer; or
- (3) For medical, surgical or hospital care or service . . .

RCW 49.48.010 (2011). An employer may not, therefore, withhold an employee's wages for the purpose of recovering a debt allegedly owed by the employee without that employee's agreement. Instead, the remedy available for an employer to collect a debt owed by an employee is the right to sue. *Cameron v. Neon Sky, Inc.*, 41 Wash.App. 219, 223, 703 P.2d 315 (Div. 1, 1985).

Defendants properly asserted claims against Plaintiffs as counterclaims in the present action. Though there may have been a

1 violation of RCW 49.48.010, the purpose of withholding wages was  
2 not to pay any debt allegedly owed by Plaintiffs and now  
3 associated with Defendants' counterclaims. Wages were withheld  
4 because of MetaXpert's alleged cash flow problems. Allowing  
5 Defendants counterclaims to offset wages owed to Plaintiff Luke  
6 Richey does not retroactively allow wages to be withheld for an  
7 unlawful purpose, it simply allows Defendants the opportunity to  
8 raise a claim at the appropriate time. To deny Defendants the  
9 opportunity to raise claims against Plaintiffs could deny them  
10 any remedy for legitimate injury. Alternatively, requiring  
11 Defendants to bring such claims in a separate suit would be an  
12 unnecessary burden on all parties and a waste of court resources.

13 Except in narrow circumstances where an employee claims a  
14 violation of minimum wage or overtime laws, an employers right to  
15 counterclaim should not be limited. Interpretation of the FLSA by  
16 federal courts is not relevant to the present controversy because  
17 Plaintiffs' claims are not based on violations of minimum wage or  
18 overtime laws. The justification for shielding Plaintiffs from  
19 some counterclaims in minimum wage and overtime cases, protecting  
20 the right to earn a living and receive a minimum level of  
21 compensation, does not logically extend to a case involving wages  
22 owed at termination or unlawfully withheld wages where the  
23 employee plaintiff was compensated well above the minimum level.  
24 Allowing Defendants to assert counterclaims against Plaintiffs'  
25 claims does not violate either the express language or intent of  
26

1 RCW 49.48.010. Defendants' counterclaims, if proven, should be  
2 allowed to off-set money owed to Plaintiff Richey.

#### 3 **IV. CONCLUSION**

4 The court concludes that Plaintiff Richey is entitled to  
5 judgment as a matter of law on the issue of unpaid wages in the  
6 amount of \$56,534.70. The court further concludes that  
7 Defendants can demonstrate a genuine factual issue as to: 1)  
8 severance, 2) health insurance benefits, and 3) exemplary damages  
9 under RCW 49.52.070. Because the court finds no binding  
10 precedent to preclude Defendants' counterclaims, if successful,  
11 from being set-off against any amount recovered for unpaid wages,  
12 judgment will be held in abeyance until such time as the  
13 counterclaims and existing questions of fact are decided.  
14 Accordingly,

#### 15 **IT IS ORDERED** that:

16 1. Plaintiffs' Motion for Partial Summary Judgment, **ECF No.**  
17 **172**, is **GRANTED in part** and **DENIED in part**. Unpaid wages in the  
18 amount of \$56,534.70 are found to be due and owing. Reasonable  
19 attorney's fees relating to claims for wages owed under RCW  
20 49.48.010 are awarded, however, the amount is yet to be  
21 determined.

22 2. Plaintiffs shall submit a declaration indicating and  
23 explaining the attorneys' fees relating to claims for wages owed  
24 under RCW 49.48.010 on or before August 5, 2011, which declaration  
25 shall include all attorney and legal assistant time spent, method  
26

1 used in calculating fees, hourly rates and dates of service. If  
2 they so elect, Defendants shall file any response to said  
3 declaration on or before August 26, 2011.

4 **IT IS SO ORDERED.** The District court Executive is directed to  
5 enter this Order and provide copies to counsel.

6 **DATED** this 15th day of July, 2011.

7  
8 ***s/Lonny R. Suko***

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LONNY R. SUKO  
United States District Judge